

PROLOGIS NA3 NV II, LLC,) 3:11-cv-00346-HDM-WGC
)
Plaintiff,)
) ORDER
vs.)
)
IGT, INC.,)
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Defendant.)
)

This matter commenced on May 13, 2011 when Prologis filed a complaint against IGT, claiming that IGT owed Prologis damages for breach of a lease agreement made between the parties. (See *generally* Complaint, Doc. #1). The matter proceeded to a bench trial on November 18-20, 2013. (See Doc. ##85, 88, 89.) The court

1 then issued a judgment in favor of the plaintiff on January 29,
2 2014, awarding Prologis damages for breach of contract in the
3 amount of \$2,531,299.00. (Doc #96 at 1.)

4 In its "Findings of Fact and Conclusions of Law" (Doc. #95 at
5 26 ("Decision")), the court found that "Prologis is entitled to an
6 award of costs and attorneys' fees as the prevailing party in
7 accordance with the provisions of Section 22 in the lease." *Id.*

8 The court ordered that

9 Prologis shall submit to the court its bill of costs and
10 affidavits in support of reasonable attorneys' fees on or
11 before March 1, 2014. The Clerk of Court will then tax costs.
12 Any objection to the taxation of costs shall be filed within
20 days of the taxation of costs by the Clerk. Any objections
to Prologis' request for attorneys' fees shall be filed within
20 days after the filing of Prologis' request for fees.

13 *Id.*

14 Prologis then filed the instant motion on February 28, 2014.
15 On the same day, it filed a bill of costs. IGT filed no objection
16 to Prologis' bill of costs, and the Clerk of Court taxed costs in
17 the amount of \$6,123.27 against IGT on April 7, 2014. IGT then
18 responded to Prologis' motion on March 20, 2014, and Prologis
19 replied on April 7, 2014. Prologis has requested \$373,266.00 in
20 attorneys' fees and \$29,534.41 in non-taxable, out-of-pocket
21 litigation costs, for a total of \$402,800.41.¹

22 **STANDARD**

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25 ¹ Prologis initially requested a total award of \$390,766.93, comprised
26 of \$361,333.80 in attorneys' fees and \$29,433.13 in non-taxable litigation
27 costs. However, Prologis stated in its motion that it would "update [its
28 request] with fees and costs which are incurred through the date of
Prologis' reply on this motion." (P. Mot. 18 n.13.) In its reply, Prologis
then increased its attorneys' fee award request by \$11,932.20 and litigation
expenses by \$101.28 to account for additional fees and expenses accumulated
after filing the motion. (P. Reply 5 n.4, 6, 6 n.5.)

1 Federal Rule of Civil Procedure 54(d) (2) sets forth the
2 procedure for obtaining an award of attorneys' fees in federal
3 court. It does not, however, provide the substantive basis for
4 such an award. See *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 197
5 F.3d 1276, 1281 (9th Cir. 1999). Because jurisdiction in this case
6 is based on diversity, the court must apply state law in
7 determining whether an award of attorneys' fees is allowed. *Canada*
8 *Life Assurance Co. v. LaPeter*, 563 F.3d 837, 847 (9th Cir. 2009).
9 In Nevada, a court may award attorneys' fees to a prevailing party
10 if authorized by statute, rule, or contract. *Frank Settlmeyer &*
11 *Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1220 (Nev.
12 2008). In the instant action, the court has already found that
13 Prologis is entitled to an award of costs and attorneys' fees as
14 the prevailing party in accordance with various provisions of
15 Section 22 of the lease between the parties. (Doc. #95 at ¶ 32.)

16 Once it has been established that a party is entitled to an
17 award of attorneys' fees, the court must determine what fee is
18 "reasonable." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). To
19 determine a reasonable fee award, the court must begin by
20 calculating the "lodestar." *Caudle v. Bristow Optical Co., Inc.*,
21 224 F.3d 1014, 1028 (9th Cir. 2000). "The 'lodestar' is calculated
22 by multiplying the number of hours the prevailing party reasonably
23 expended on the litigation by a reasonable hourly rate." *Id.*
24 (quoting *Morales v. City Rafael*, 96 F.3d 359, 363 (9th Cir. 1996).
25 Reasonable hourly rates "are to be calculated according to
26 prevailing market rates in the relevant community." *Blum v.*
27 *Stenson*, 465 U.S. 886, 895 (1984). After computing the lodestar,
28 the court must "assess[] whether it is necessary to adjust the

1 presumptively reasonable lodestar figure on the basis of the *Kerr*
2 factors.”² *Morales*, 96 F.3d at 363.

3 In addition to attorneys’ fees, the prevailing party is also
4 entitled to recover court costs. Fed. R. Civ. P. 54(d)(1); LR 54-
5 1; N.R.S. § 18.020; N.R.S. § 18.005. Pursuant to the court’s
6 order, Prologis has already filed a Bill of Costs (Doc. #97), and
7 IGT has already had costs taxed against it in the amount of
8 \$6,123.127. (Doc. #102.) Recovery of costs beyond those covered
9 by Federal Rule of Civil Procedure 54(d)(1) is possible under
10 Federal Rule of Civil Procedure 54(d)(2), which allows for a party
11 to move for attorneys’ fees and “related non-taxable expenses.”
12 See Fed. R. Civ. P. 54(d)(2). Where a statute authorizes an award
13 of reasonable attorney’s fees to a prevailing party, as is the case
14 in Nevada (see N.R.S. § 18.020), the court has the discretion to
15 award reasonable out-of-pocket litigation expenses as part of the
16 attorney’s fee award “when it is the prevailing practice in a given
17 community for lawyers to bill those costs separate from their
18 hourly rates.” *Grove v. Wells Fargo Fin. Calif., Inc.*, 606 F.3d
19 577, 579-82 (9th Cir. 2010).

20 ANALYSIS

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22 ² The *Kerr* factors are: “(1) the time and labor required, (2) the novelty
23 and difficulty of the questions involved, (3) the skill requisite to perform
24 the legal service properly, (4) the preclusion of other employment by the
25 attorney due to acceptance of the case, (5) the customary fee, (6) whether
26 the fee is fixed or contingent, (7) time limitations imposed by the client
27 or the circumstances, (8) the amount involved and the results obtained, (9)
28 the experience, reputation, and ability of the attorneys, (10) the
‘undesirability’ of the case, (11) the nature and length of the professional
relationship with the client, and (12) awards in similar cases.” *Morales*,
96 F.3d at 363 n8 (quoting *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67,
70 (9th Cir. 1975)).

1 In its opposition, IGT has raised only two objections to
2 Prologis' fee request. First, IGT argues that Prologis should not
3 be able to recover attorneys' fees for time its counsel spent
4 working on a state court summary eviction action. (Def. Opp'n 4-
5 5.) Second, IGT argues that Prologis has requested attorneys' fees
6 for an "excessive" amount of work performed after the trial, and
7 that the court should (1) reduce Prologis' fee award accordingly,
8 and (2) should not award Prologis additional fees for any work
9 performed after filing its motion. (Def. Opp'n 5-6.)

10 IGT has notably not objected in any way to the reasonableness
11 of the rest of the hours expended by Prologis' counsel, or to
12 Prologis' counsel's hourly rates. (See generally Def. Opp'n.)
13 Prologis has argued that there should be neither upward nor
14 downward adjustments made to its lodestar calculation based upon
15 the *Kerr* factors (P. Mot. 13-17); IGT has also not argued for any
16 *Kerr* adjustments (see generally Def. Opp'n). Finally, IGT has not
17 objected to Prologis' request for recovery of non-taxable costs in
18 the amount \$29,534.41.³ *Id.*

19 The court will address IGT's two objections separately below.
20 However, to the extent that IGT has not objected to Prologis'
21 motion, the court hereby grants that motion. The court finds that
22 the time spent by Prologis' attorneys (other than the time spent on
23 the summary eviction motion and after the case was fully submitted,
24 which will be addressed below) is reasonable given the complexity
25 of the issues involved and the duration of the litigation. The
26 court concludes that Prologis' attorneys' billing rates are

27 ³ These non-taxable litigation costs are separate from the taxable
28 costs assessed by the Clerk of Court on April 7, 2014 in the amount of
\$6,123.27, to which costs IGT has also not objected.

1 reasonable given the prevailing market rates in the community.
2 (See P. Mot. 11 and referenced attached Declarations and Exhibits.)
3 The court finds that the circumstances of the case do not warrant
4 adjustment to the lodestar based on the *Kerr* factors, and that the
5 lodestar (aside from IGT's two specific objections, which, again,
6 will be addressed below) is reasonable, especially given Prologis'
7 10 percent self-imposed, across-the-board reduction of its fee
8 request and IGT's non-opposition to this portion of Prologis'
9 motion. (See P. Mot. 12-13; see *generally* Def. Opp'n.) The court
10 further finds that Prologis is entitled to recover non-taxable
11 litigation costs, as it is "the prevailing practice in [this]
12 community for lawyers to bill those costs separate from their
13 hourly rates." *Grove*, 606 F.3d 577 at 579-82; P. Mot. 17-18.

14 **I. State Court Summary Eviction Action**

15 Prologis has included in its lodestar calculations time spent
16 working on a state court summary eviction action it filed on July
17 14, 2010 against IGT. (P. Mot. 3-4, 8-9, Ex K.) IGT points out
18 that Prologis seeks compensation for \$16,927.20⁴ in fees incurred
19 exclusively for work on the state summary eviction action, and
20 argues that Prologis should not be entitled to recover these fees
21 because the summary eviction action was a separate, unrelated
22 action in which Prologis was not even a "prevailing party." (Def.
23 Opp'n 3-5.)

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26 ⁴ IGT has noted that Prologis' lodestar calculations include
27 \$18,808.00 in fees incurred exclusively for work on the state court summary
28 eviction action; however, as IGT points out, because Prologis reduced its
fee request across the board by 10 percent, this amounts to an actual
request of only \$16,927.20 in fees related to the summary eviction. (Def.
Opp'n 4-5, 5 n.2.)

1 After IGT breached the parties' lease agreement by prematurely
2 vacating the leased premises and attempting to terminate the lease
3 without having given appropriate written notice (Decision 12, 24-
4 25), Prologis initiated a summary eviction action against IGT in
5 state court under the provisions of Chapter 30 of the Nevada
6 Revised Statutes. (Decision 12.) Prologis ultimately dismissed
7 the action unilaterally without prejudice after IGT heavily
8 contested it and "it became abundantly clear that Defendant was not
9 going to make any claims to possession of the premises." (P. Mot.
10 3-4.)

11 Prologis argues that it filed the summary eviction action "to
12 eliminate any concerns/arguments that it would be acting wrongfully
13 in re-taking possession of Defendant's premises." (P. Mot. 3.) In
14 its reply, Prologis further maintains that

15 an award of fees for time expended in the summary eviction
16 action would be directly analogous to awarding fees in a
17 related, pre-litigation administrative proceeding as the
18 summary eviction action was a necessary and integral step in
19 the litigation process to first ensure that the Defendant had
indeed moved out for good and was no longer claiming a
possessory interest in the premises.

19 (P. Reply 3.)

20 Given Prologis' stance throughout the instant action that IGT
21 breached the lease agreement by vacating the premises early and
22 ceasing to pay rent, all the while improperly claiming to have
23 exercised its early termination option, the court is not persuaded
24 by Prologis' claim that its state court summary eviction action was
25 "a necessary and integral step in the litigation process" or was
26 needed to "ensure that the defendant had indeed moved out for
27 good." *Id.* Multiple written communications between the parties
28 introduced at trial demonstrated that Prologis was well apprised of

1 IGT's intent to vacate and relinquish all possession of the
2 premises.⁵ Therefore, the court finds that the summary eviction
3 action was an unrelated proceeding not covered by any of the
4 various fee recovery provisions of the lease agreement between the
5 parties, and that Prologis is therefore not entitled to recover
6 attorneys' fees stemming from it. Accordingly, the court reduces
7 Prologis' lodestar by \$16,927.20.

8 However, the court finds that no further reduction is
9 necessary to account for removing Prologis' counsel's time working
10 on the summary eviction action from the fee award. Despite IGT's
11 claims to the contrary (see Def. Opp'n 4), the court finds that
12 Prologis' record keeping is neither inappropriately bundled nor
13 inappropriately redacted such that it is "impossible to tell
14 whether [some of Prologis' counsel's] bills are for work done in
15 this action [or the summary eviction action]." (Def. Opp'n 4.)
16 The court finds that Prologis has satisfactorily identified the
17 subject matter of its time expenditures, and that Prologis is
18 entitled to redact its time log as needed to protect attorney-
19 client privilege. See P. Mot. Ex. K; P. Reply 3-4; *Hensley*, 461
20 U.S. at 433; *MGIC Indem. Corp. V. Weisman*, 803 F.2d 500, 505 (9th
21 Cir. 1986). Moreover, even if some of the redacted or allegedly
22 combined billing entries are in fact for work related to the
23 summary eviction action, the court is satisfied that Prologis'
24 self-imposed 10 percent reduction of its lodestar more than offsets

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26 ⁵ For example, Joint Exhibit No. 47, which was received into evidence
27 during the first day of the trial, constituted an email from Edwin
28 Strickland, of IGT, to Travis Durfee, of Prologis, informing Prologis that
"we, IGT, have vacated the building . . . All American Lock finished
changing the locks from IGT master to ProLogis master and we have no more
access to the building." (See Doc. #90 at 5, 85 at 2.)

1 any accidental inclusion of such fees in its eventual fee award.

2 (See P. Mot. 12-13.)

3 **II. "Excessive" Work Performed After Trial**

4 IGT notes in its opposition that Prologis has requested
5 compensation for 61 hours of work performed after the case was
6 fully submitted, approximately 50.10 hours of which was for work on
7 Prologis' motion for fees. (Def. Opp'n 5.) This amounts to a sum
8 of \$19,427.00, less Prologis' across-the-board 10 percent decrease.
9 (Def. Opp'n 5-6.) IGT concedes that Prologis may legally recover
10 fees for work done on its own motion for fees, but nonetheless
11 argues that 50.10 hours of time spent on such a motion, as well as
12 61 hours spent total post-judgment, is unreasonable and should not
13 be fully compensated. *Id.* IGT further argues that, because
14 Prologis, in its motion, requested fees for an "excessive" amount
15 of work performed by its counsel after trial, Prologis should also
16 be denied any fees later claimed for work performed after
17 submitting its motion. (Def. Opp'n 6.)

18 In its reply, Prologis did increase its attorneys' fee award
19 request by \$11,932.20 and litigation expenses by \$101.28 to account
20 for additional fees and expenses accumulated after filing the
21 motion.⁶ (P. Reply 5 n.4, 6, 6 n.5.) Prologis also attached a
22 detailed "Supplemental Lodestar Summary" and a list of
23 "Supplemental Costs" to its reply, showing how these new fees and
24 costs arose. (P. Reply Ex. 1-2; P. Reply 5 n.4.)

25 The court cannot agree that the amount of time spent by
26 Prologis' counsel post-trial, particularly on the fee motion, is

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28 ⁶ See *supra* note 1.

1 excessive. As Prologis explains in its reply, to prepare the fee
2 motion, Prologis' counsel

3 had to research the issues, draft the 18-page motion, prepare
4 and secure signed, supporting declarations from outside
5 counsel, compile, review and redact forty-five pages of
single-spaced billing entries and otherwise properly document
its requests for fees and litigation expenses.

6 (P. Reply 5.) At the time Prologis filed its fee motion, as IGT
7 points out, Prologis' requested compensation for work on the fee
8 motion made up a mere 4 percent of Prologis' total requested
9 compensation. (Def. Opp'n 6.) Additionally, the 43.60 hours spent
10 by Prologis' counsel after February 26, 2014, which are catalogued
11 in the "Supplemental Lodestar Summary" attached to Prologis' reply,
12 are also not excessive, especially given Prologis' self-imposed 10
13 percent reduction in requested fees. (P. Reply Ex. 1; P. Mot. 12-
14 13.) The court finds that Prologis' counsel's time working on the
15 fee motion, and after submitting its case more generally,
16 constitutes "hours reasonably expended on the litigation," given
17 the complexity and high stakes of issues involved. *Caudle*, 224
18 F.3d at 1028.

19 CONCLUSION

20 Accordingly, the plaintiff's motion for attorneys' fees and
21 non-taxable litigation expenses (Doc. #98) is **GRANTED**. Plaintiff

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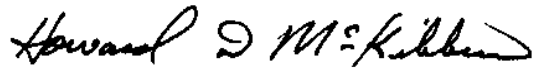
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1 is awarded attorneys' fees in the amount of \$356,338.80 and non-
2 taxable litigation expenses in the amount of \$29,534.41, together
3 with the costs previously taxed by the Clerk of Court (Doc. #102)
4 in the amount of \$6,123.27, for a total award of \$391,996.48.

5 **IT IS SO ORDERED.**

6 DATED: This 6th day of June, 2014.

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9 UNITED STATES DISTRICT JUDGE
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